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COURT OF APPEALS
DIVISION TWO

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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

YUMA COUNTY ATTORNEY'S)
OFFICE,)

Petitioner,)

v.)

HON. MICHAEL MILLER, Judge of the)
Superior Court of the State of Arizona, in)
and for the County of Pima,)

Respondent,)

and)

JANE ROE, as natural parent and next best)
friend of JOHN DOE, a minor,)

Real Party in Interest.)

_____)
CITY OF NOGALES,)

Defendant/Real Party in Interest.)
_____)

2 CA-SA 2008-0086
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. C20074197

JURISDICTION ACCEPTED; RELIEF DENIED

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P E L A N D E R, Chief Judge.

¶1 Petitioner Yuma County Attorney’s Office (YCAO)¹ seeks special action review of the respondent judge’s denial of its motion to dismiss the first amended complaint filed in the underlying action on the ground of absolute immunity and the denial of its motion for reconsideration. Although we generally decline jurisdiction when a party seeks review of the denial of a motion to dismiss, *Henke v. Superior Court*, 161 Ariz. 96, 98, 775 P.2d 1160, 1162 (App. 1989), we will accept jurisdiction if the motion is based on a claim of immunity. *Darragh v. Superior Court*, 183 Ariz. 79, 80, 900 P.2d 1215, 1216 (App. 1995); *see also State v. Superior Court*, 186 Ariz. 294, 296, 921 P.2d 697, 699 (App. 1996) (accepting special action jurisdiction when petitioner had no “adequate remedy by appeal”

¹Although plaintiff’s first amended complaint named as defendants both Yuma County and the Yuma County Attorney’s Office, the parties stipulated below, and the respondent judge ordered, that “there were errors in the captions” and only the Yuma County Attorney’s Office “is the appropriate defendant.”

from trial court's denial of motion to dismiss on immunity grounds). We therefore accept jurisdiction of this special action.

¶2 A defendant's absolute immunity claim presents "a question of law for the trial court, subject to this court's *de novo* review." *Link v. Pima County*, 193 Ariz. 336, ¶ 18, 972 P.2d 669, 674 (App. 1998); *cf. Burk v. State*, 215 Ariz. 6, ¶ 7, 156 P.3d 423, 426 (App. 2007) ("Whether judicial immunity exists is a legal question for the court."). And, because this special action arises from the denial of a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., we may "look only to the pleading itself and consider the well-pled factual allegations contained therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 7, 189 P.3d 344, 346 (2008).

¶3 In her first amended complaint, plaintiff/real party in interest alleged YCAO had been negligent or grossly negligent in failing to bring to trial, within 120 days of filing, its petition seeking the civil commitment of Ted Warner as a sexually violent person (SVP). *See* A.R.S. §§ 36-3704, 36-3706. In denying YCAO's motion to dismiss, the respondent judge suggested he did so based, in part, on his rejection of YCAO's claim of absolute immunity under common law. The respondent denied the motion "as presently formulated" and directed "[c]ounsel . . . to address immunities as listed in A.R.S.[§§ 12-820 through 12-826]," and the decision in *Greenwood v. State*, 217 Ariz. 438, 175 P.3d 687 (App. 2008), "under A.R.S. §[12-820.02(A)(1)]."

¶4 The respondent judge more clearly signaled his rejection of YCAO's common-law-immunity argument at the hearing on the motion to dismiss. He acknowledged the

abolition of traditional principles of sovereign immunity, *see Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963); our supreme court's invitation to the legislature to address when a public entity and its employees should enjoy immunity from suit, *see Ryan v. State*, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982); and the legislature's enactment in 1984 of the Actions Against Public Entities or Public Employees Act (the Act), §§ 12-820 through 12-826. *See* 1984 Ariz. Sess. Laws, ch. 285, § 3. Referring to the Act, the respondent then stated:

I think that changes the case law that might have been relied on under [42 U.S.C. §] 1983 and all of the federal case law.

Instead you have to look at the state case law that interprets the Arizona Statutes, because after the *Ryan* decision from our Arizona Supreme Court I'm not sure *Imbler* [*v. Pachtman*, 424 U.S. 409, 420-21 (1976),] really applies anymore.

....

. . . I think the case law that [YCAO] cite[d] is completely out of date.

And since there's no reference to Title 12 and to the immunity under [§ 12-]820, what I'm also concerned about is that none of the statutes have been looked at by the defendant, and the plaintiff hasn't had an opportunity to respond to it.

¶5 As we explain below, the respondent judge erred as a matter of law and thereby abused his discretion to the extent he rejected outright the applicability of common law principles of immunity and found, instead, only §§ 12-820 through 12-826 are potentially implicated. *See* Ariz. R. P. Spec. Actions 3(c); *see also Grand v. Nacchio*, 214 Ariz. 9, ¶ 21,

147 P.3d 763, 771 (App. 2006) (error of law constitutes abuse of discretion). But, because the judge correctly denied YCAO’s motion for dismissal under Rule 12(b)(6), we deny relief.

¶6 “The Act codified various common law doctrines that conferred absolute and qualified immunity on various public entities and employees.” *City of Tucson v. Fahringer*, 164 Ariz. 599, 600, 795 P.2d 819, 820 (1990); *see also Fidelity Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, ¶ 7, 954 P.2d 580, 582-83 (1998) (“Stating the purpose and intent of section 12-820.01, the legislature declared as ‘the public policy of this state that public entities are liable for acts and omission of employees in accordance with the statutes and [the] common law.’”), *quoting* 1984 Ariz. Sess. Laws, ch. 285, § 1A (alteration in *Fidelity*). Indeed, reflecting its intent to retain many of the common law immunities, the legislature provided in § 12-820.05(A): “Except as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state.”

¶7 Thus, the cases decided both before and after enactment of the Act still may provide guidance in determining whether a public entity or employee is entitled to common-law immunity under circumstances not specifically covered by the statutes, and whether an act or omission constitutes “[t]he exercise of a judicial or legislative function” for purposes of absolute immunity under § 12-820.01(A)(1). *See generally DeSilva v. Baker*, 208 Ariz. 597, ¶¶ 16, 21, 96 P.3d 1084, 1089, 1090 (App. 2004) (under common law, absolute, quasi-judicial immunity applied to probation officers’ preparation of presentence reports); *Galati*

v. Lake Havasu City, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996) (differentiating “action” from “absence of action” for purposes of legislative immunity under § 12-820.01(A)(1)); *Evenstad v. State*, 178 Ariz. 578, 583-84, 875 P.2d 811, 816-17 (App. 1993); *see also Adams v. State*, 185 Ariz. 440, 443, 916 P.2d 1156, 1159 (App. 1995) (acknowledging “[t]he nature and scope of judicial immunity raise perplexing and somewhat amorphous issues, which are not susceptible to easy resolution in some cases,” and referring for guidance to case law that predated and postdated Act); *Challenge, Inc. v. State ex rel. Corbin*, 138 Ariz. 200, 204-05, 673 P.2d 944, 948-49 (App. 1983) (finding prosecutors absolutely immune from claims relating to their acts and alleged misrepresentations in civil enforcement proceedings and prior filing of baseless suit). Therefore, to the extent the respondent judge viewed the case law as inapplicable or obsolete in connection with YCAO’s claim of absolute prosecutorial immunity, the judge erred.

¶8 We agree with YCAO that prosecutorial immunity has an independent, common law basis, separate and apart from the Act. As Division One of this court noted well after the Act took effect:

Prosecutors are generally immune from civil liability for actions taken in their official capacities. This immunity is absolute when the prosecutor acts within the scope of his or her authority and in a quasi-judicial capacity. The prosecutor’s “scope of authority” includes those activities with some connection to the general matters committed to the prosecutor’s control or supervision. “Quasi-judicial” activities are those that are intimately associated with the judicial process. But a prosecutor’s conduct while acting as an administrator or investigative officer is not “quasi-judicial” and, therefore, does not enjoy absolute immunity. Accordingly, a court must apply a “functional analysis” to determine whether absolute immunity

exists: it must examine the nature of the prosecutor’s activities. Furthermore, an examining court must disregard the intent, motive, or state of mind that the prosecutor had when performing the activity in question.

State v. Superior Court, 186 Ariz. at 297, 921 P.2d at 700 (citations omitted) (also noting “[a]bsolute prosecutorial immunity is not limited to criminal prosecutions, but extends to civil enforcement proceedings, as well”).² In short, common law prosecutorial immunity survived our legislature’s enactment of the Act.

¶9 In addition, we find misplaced the respondent’s apparent focus on § 12-820.02. That statute addresses qualified immunity of public entities and employees in particular circumstances with regard to specific, enumerated acts or omissions. Based on the allegations of plaintiff’s first amended complaint, § 12-820.02 does not appear to be implicated here at all. Consequently, *Greenwood*, which the respondent judge directed YCAO to address, appears to be of limited applicability here. But, even if § 12-820.02 were potentially applicable to YCAO’s immunity defense, the first amended complaint does not allege facts pertinent to any qualified immunity claim. Such facts would include the nature

²See also *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (“it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance” in evaluating claims of absolute prosecutorial immunity); *id.* at 127, 131 (in determining immunity, courts “examine ‘the nature of the function performed, not the identity of the actor who performed it’”; “the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate”), quoting *Forrester v. White*, 484 U.S. 219, 229 (1988); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (“[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.”); *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976) (“state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution” held immune from suit under 42 U.S.C. § 1983).

of the prosecutor's conduct; any reasons why the commitment petition was not timely brought to trial and thus was later dismissed; whether the prosecutor's conduct fell below a reasonable standard of care and, if so, whether his acts or omissions can be characterized as gross negligence. Consequently, because any qualified immunity claim by YCAO could not be resolved based on the first amended complaint alone, disposition pursuant to Rule 12(b)(6) would have been inappropriate. *See Luchanski v. Congrove*, 193 Ariz. 176, ¶¶ 16-22, 971 P.2d 636, 639-40 (App. 1998) (reversing dismissal under Rule 12(b)(6) of plaintiff's complaint even though qualified immunity statute applied); *cf. Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 15, 24 P.3d 1269, 1273 (2001) (reversing dismissal of complaint on absolute immunity grounds); *City of Phoenix v. Yarnell*, 184 Ariz. 310, 321, 909 P.2d 387, 398 (1995) (finding insufficient factual record developed on summary judgment to support finding county immune for acts of county attorney's office).

¶10 The only immunity statute arguably implicated here is § 12-820.01(A)(1), which provides absolute immunity for a public entity for the "acts and omissions of its employees constituting . . . [t]he exercise of a judicial or legislative function." Certain acts by a prosecutor have been characterized as quasi-judicial in nature for purposes of immunity claims. *See State v. Superior Court*, 186 Ariz. at 297, 921 P.2d at 700; *see also Imbler*, 424 U.S. at 420-21 (acknowledging existing case law that recognized prosecutor's immunity as quasi-judicial and rejecting petitioner's argument that, "as a member of the executive branch, [the prosecutor] cannot claim the immunity reserved for the judiciary, but only a qualified immunity"). But based in part on the legislature's stated intent in enacting the Act, our

supreme court stated in *Fidelity*, 191 Ariz. 222, ¶ 9, 954 P.2d at 583, “under section 12-820.01, public entities are protected by absolute immunity when the process involves legislative or judicial decision making within the respective powers granted to the legislature and the judiciary, but entities are entitled to immunity for administrative action only to the extent such action involves the determination of fundamental governmental policy.” *See also Doe*, 200 Ariz. 174, ¶¶ 5-6, 24 P.3d at 1271. Thus, § 12-820.01 arguably does not apply to the quasi-judicial functions of a prosecutor but, rather, only to functions that are truly judicial in nature. *See, e.g., State v. Superior Court*, 186 Ariz. at 297, 298, 921 P.2d at 700, 701 (addressing prosecutorial immunity based on common law without reference to § 12-820.01).

¶11 Even assuming, without deciding, that the legislature intended § 12-820.01(A)(1) to apply to the quasi-judicial functions of prosecutors, as we previously stated, that does not mean the common law and cases predating the Act have no bearing on the determination whether a public entity is entitled to absolute immunity under the statute. Case law addressing immunity claims and examining the distinctions between judicial acts and those more administrative in nature may provide guidance in applying the statute to varying factual circumstances. *See Chamberlain v. Mathis*, 151 Ariz. 551, 555, 729 P.2d 905, 909 (1986) (“Both qualified and absolute immunity protect only acts reasonably within the employee’s discretionary authority.”); *Acevedo v. Pima County Adult Probation Dep’t*, 142 Ariz. 319, 321-22, 690 P.2d 38, 40-41 (1984) (“administrative and supervisory” functions of adult probation officers not covered by absolute judicial immunity from claim of negligent supervision of convicted felon); *Burk*, 215 Ariz. 6, ¶ 8, 156 P.3d at 426 (“To determine when

a non-judge is cloaked with judicial immunity, we examine the nature of the function entrusted to that person and the relationship of that function to the judicial process.”); *Adams*, 185 Ariz. at 445, 447, 916 P.2d at 1161, 1163 (noting that “prosecutorial immunity . . . is analogous to judicial immunity” and that determination of absolute immunity hinges on “functional analysis” of multiple factors, including “policy rationales”).

¶12 The inaction or omission by YCAO alleged in the first amended complaint does not appear to implicate the kind of discretionary prosecutorial decision-making, such as whether to file an SVP petition for civil commitment in the first instance, that could be characterized as quasi-judicial. *See State v. Superior Court*, 186 Ariz. at 297, 298, 921 P.2d at 700, 701 (recognizing when prosecutors engage in activities within scope of authority that are “intimately associated with the judicial process,” they are engaged in “quasi-judicial” activities for which they enjoy absolute immunity; acknowledging decision whether to initiate action as “precisely the type [of conduct] protected by absolute prosecutorial immunity”); *Nation v. Colla*, 173 Ariz. 245, 250-51, 841 P.2d 1370, 1375-76 (App. 1991) (relying on *Imbler* and finding prosecutors “immune from civil liability for the initiation and presentation of the state’s case”); *see also DeSilva*, 208 Ariz. 597, n.8, 96 P.3d at 1090 n.8; *cf. Buckley v. Fitzsimmons*, 509 U.S. 259, 271-72 (1993) (prosecutors who allegedly fabricated evidence not entitled to absolute immunity). However, further discovery in this case, which the parties clearly contemplated, likely will shed necessary light on the nature of the acts, omissions, or decisions on which the plaintiff’s claim against YCAO rests; whether Arizona’s absolute immunity statute, § 12-820.01, is implicated; whether YCAO has

potential immunity under common law; and whether YCAO may be entitled to qualified immunity.

¶13 As we stated above, the respondent judge erred by seeming to reject outright YCAO’s claim that it is entitled to immunity under common law principles and suggesting instead that only §§ 12-820 through 12-826 may be implicated here. Unlike the situation in *State v. Superior Court*, however, we cannot determine from the sparse facts alleged in plaintiff’s first amended complaint whether YCAO’s failure to timely request a trial on its SVP petition occurred “in a quasi-judicial capacity and within the prosecutor’s scope of authority.” 186 Ariz. at 298, 921 P.2d at 701. Because YCAO’s claim of absolute prosecutorial immunity cannot be resolved based solely on the face of the first amended complaint, the respondent did not abuse his discretion in denying YCAO’s motion to dismiss pursuant to Rule 12(b)(6). *See Luchanski*, 193 Ariz. 176, ¶¶ 16-22, 971 P.2d at 639-40; *see also Yarnell*, 184 Ariz. at 321, 909 P.2d at 388.

¶14 As the respondent judge correctly noted, by referring to various factual allegations and materials outside plaintiff’s first amended complaint, YCAO’s motion below actually fell within Rule 56, Ariz. R. Civ. P., not Rule 12(b)(6), and “there’s an awful big

difference between [the two].”³ Accordingly, although we accept jurisdiction of this special action, we deny relief. YCAO’s request for an award of attorney fees and costs is denied.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge

³We express no opinion on whether YCAO ultimately might be entitled to summary judgment on its immunity defense or whether any genuine issues of material fact might exist to preclude that. Nor do we address whether any factual issues relating to YCAO’s absolute immunity defense might first require resolution by a jury before the trial court ultimately rules on the legal issue of whether that defense applies. *See Link*, 193 Ariz. 336, ¶ 18, 972 P.2d at 674. Based on the limited record before us, and considering the procedural posture of the case, “we cannot determine as a matter of law that [YCAO] is absolutely immune” from the claims made against it. *Id.* ¶ 23. Finally, we note that the party seeking absolute immunity bears the burden of demonstrating that such immunity applies to the function in question. *See Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005).